



Criminal Justice and Human Rights

An agenda for effective human rights protection in Sudan's new constitution

March 2012

Acknowledgments

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1. Introduction

Sudan is yet again undergoing a constitutional review process following the end of the interim period under the Comprehensive Peace Agreement (CPA). This process takes place against a legacy of human rights violations, which in no small part are due to a failure of the criminal justice system. It is in this context that this Position Paper addresses the critical question of why successive Sudanese Bills of Rights have to date failed to provide adequate protection and ensure the effective exercise of the rights to personal liberty and security, non-discrimination and equality before the law, as well as fair trial guarantees. In other words, why have many constitutions failed to be 'translated' into practice, including by bringing statutory law into conformity with its provisions, institutional reforms and adequate judicial protection?

The Paper focuses on the substance of the Bill of Rights from a criminal justice perspective and its implementation. It develops a set of proposals aimed at addressing substantive shortcomings of the provisions related to criminal justice contained in the Bill of Rights of Sudan's Interim National Constitution 2005 (INC). In addition, it identifies the mechanisms that need to be put in place to ensure effective implementation of the Bill of Rights. In this respect, it examines both substantive provisions and the effectiveness of the bodies and CPA commissions tasked under the INC to protect and promote human rights (i.e. Human Rights Commission, National Commission for the Review of the Constitution (NCRC), and the National Judicial Service Commission).

Institutional reform of the Police and the National Intelligence and Security Services (NISS) are critical preconditions for effective human rights protection. The paper therefore advocates that any effective constitutional review process in Sudan must include security sector reform (SSR) as one of its priorities. In particular, the new constitution should address the NISS's powers of arrest and detention, immunities of NISS personnel as well as accountability and effective parliamentary and judicial oversight.

The judiciary plays an important role, and there is a need for the courts to assume and effectively exercise their supposed role in protecting and promoting human rights. The Paper therefore proposes that the Constitution specifies judicial powers and vests courts with greater control over the whole process of administration of criminal justice from arrest to post trial stage (including the right to habeas corpus) to reparation.

The apparent contradiction between constitutional guarantees related to criminal justice and national criminal laws that visibly contradict the INC's Bill of Rights have already been examined in detail elsewhere.¹ Taking the widespread

¹ See for a comprehensive review of key areas of Sudan's criminal law ('repressive criminal legislation, arrest, detention and fair trial, accountability for international crimes and criminal law and gender-based

recognition that statutory criminal laws need to be changed in order to implement the INC's Bill of Rights as its starting point, it considers how the constitution can best ensure that such law reform is undertaken, for example, through a Law Reform Commission, a stronger Constitutional Court or other oversight bodies.

2. Criminal Justice in the New Constitutional Design: Issues of Substance and Process

2.1. Constitutional Shortcomings: Issues of Substance

This section examines the substantive provisions of the Bill of Rights from a criminal justice perspective. This includes in particular the right of non-discrimination and equality before the law (article 31); fair trial guarantees (i.e. presumption of innocence, fair and public hearing, the right not to be compelled to testify or to confess guilt, prohibition on the use of evidence obtained through unlawful means) (article 34), the right to liberty and security of the person (arrest, detention) (article 29), the right to litigation including immunity (article 35) and restriction on death penalty (article 36), as well as the rights of women (in the context of non-discrimination). These rights are spelled out explicitly in several articles of the Bill of Rights and form an integral part of it in so far as they are recognized in international treaties to which Sudan is a party (article 27(3)).

2.1.1. Rights of non-Discrimination and Equality before the Law

The importance of the concepts of equality and non-discrimination cannot be overstated. It has been suggested that 'equality and non-discrimination constitute the single dominant theme of the International Covenant on Civil and Political Rights (ICCPR)',² and this strong emphasis is entirely appropriate; discrimination is at the root of virtually human rights abuses,³ an experience reflected in the Sudanese context.

Article 31 of the INC states that '[a]ll persons are equal before the law and are entitled without discrimination, as to race, colour, sex, language, religious creed, political opinion, or ethnic origin, to the equal protection of the law.' The grounds of non-discrimination and equality before the law under the INC are not as comprehensive as those found in articles 2(1) and 26 of the ICCPR as article 31

violence') the respective chapters by Amin Medani, Nabil Adib, Mohamed Abdelsalam Babiker and Asma Abdel Halim in L. Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate, Farnham, 2011).

² B. Ramcharan, 'Equality and Non-Discrimination', in L. Henkin (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981), 246.

³ S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2005), 680.

omits reference to 'national or social origin, property, birth, or other status'. Article 31 also lacks detail and neither uses the language of 'obligations' nor specifies that the state should take proactive measures to ensure realisation of this right. This is particularly important in a country such as the Sudan in which issues of non-discrimination and equality before the law are closely linked to inherent societal problems related to religion, customs and equality between men and women. The Bill of Rights should include an explicit duty of the state to respect and ensure respect of the rights guaranteed in the Bill of Rights to all persons without discrimination. As in the case of article 26 of the ICCPR, it is imperative that the state takes proactive legislative measures to prohibit discrimination. Therefore, article 31 should stipulate specifically that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground'.

One of the serious limitations of article 31 and the Bill of Rights in general is that it does not explicitly prohibit advocacy of various forms of national, racial or religious hatred which may amount to incitement to discrimination, hostility or violence. Equally, it does not prohibit the dissemination of ideas or theories of superiority of one race or groups of persons as provided for in article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to which Sudan is a party.⁴ While article 4 of the ICERD is already part of the Bill of Rights by virtue of article 27(3) INC, an express prohibition would be welcome to enhance awareness and strengthen protection. The Sudan is ethnically and religiously diverse, and afflicted with chronic armed conflicts and violence in which incitement and advocacy of hatred and 'ethnic criminalization' have been used as a ground for prosecuting members of certain ethnic groups. For example, the attacks on the city of Omdurman by the Darfur rebel forces Justice and Equality Movement (JEM) has led to the arrests and detention of thousands of suspected Darfuri citizens including women and children, simply on the basis of ethnic features, colour, accent or place of living.⁵ The separation of the country has also raised the spectre of enhanced discrimination of persons of Southern Sudanese origin.

Article 32 (1) of the Bill of Rights requires the state to guarantee equal rights of men and women in the enjoyment of all civil, political, social, cultural and economic rights, including the right to equal pay for equal work and other related benefits. The state shall also promote woman rights through affirmative action (article 32 (2)). However, this article does not (as in the case of article 3 of the ICCPR) impose direct obligations on the state to take all necessary steps to

⁴ Article 4 (a) of the ICERD provides that states Parties 'shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts against any race or groups of persons of another colour or ethnic origin, and also the provision of assistance to racist activities, including the financing thereof'.

⁵ See UN Special Rapporteur on the Situation of Human Rights in the Sudan, Sima Samar, UN Doc. A/HRC/9/13, 200, paras. 20-33. See also, A. Medani, 'A legacy of Institutionalized Repression: Criminal Law and Justice in Sudan', in Oette, above note 1, 68-88, at 79-80.

enable every person to enjoy those rights, including the removal of discriminatory laws related to criminal justice. This would include the availability of legal provisions preventing women from direct and autonomous access to the courts; women's rights to give evidence as witnesses on the same terms as men; and equal access to legal aid, in particular in family matters.⁶

The right to equality before the law and freedom from discrimination as protected by article 26 of the ICCPR should also form an express part of article 32 of the Bill of Rights. Article 26 requires states to act against discrimination by public and private agencies in all fields, including discrimination against women in areas such as citizenship or rights of non-citizens.⁷ From a criminal justice perspective, particular attention should be given to laws which impose more severe penalties on women than on men for adultery and other offences that violate the requirement of equal treatment.⁸ These criminal laws are applied through what is known as public order regime which has serious adverse impact on the lives of women and girls, particularly the poor, and other members of marginalised groups...⁹ This public order regime is applied through four principal legal mechanisms: the Public order laws (i.e. Khartoum Public Order Act 1998)¹⁰, the Criminal Act 1991, the Public order police and the Public order courts.¹¹ It is discriminatory against women and inherently incompatible with both the Bill of Rights and Sudan's obligations under international law.¹²

2.1.2. Freedom from Arbitrary Arrest and Detention

⁶ See Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, paras. 3 and 18.

⁷ See *Aumeeruddy-Cziffra et al. v. Mauritius*, Communication No. 035/1978, 9 April 1981 and *General Comment No. 28, HRC, para. 31*.

⁸ See section XV of the Criminal Act 1991 which includes offences such as adultery, rape, sodomy, incest, gross indecency, indecent and immoral acts, practicing prostitution, seduction. On these offences see REDRESS and KCHRED, *Reforming Sudan's Legislations on Rape, and Sexual Violence*, 2008, available at <http://www.redress.org/downloads/publications/Position%20Paper%20Rape.pdf>

⁹ See, Report of Strategic Initiative for Women in the Horn of Africa (SIHA), *Beyond Trousers, The Public Order Regime and the Human Rights of Women and Girls in Sudan*, A Discussion Paper, Submission to the 46th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, the Gambia, 12th November 2009, 5.

¹⁰ Section 26 of this Act provides for penalties including imprisonment, fine, confiscation of goods, and lashing. Section VIII of the Criminal Act 1991 entitled 'Offences against Public Tranquillity' and part XV 'Offences of Honour, Reputation and Public Morality'. Many of the provisions are vaguely worded and leave broad discretion to law enforcement officials and the judiciary, in particular article 152.

¹¹ According to SIHA, *Beyond Trousers*, above note 9, 14-15. 'Public Order Courts (POC) were established by a decision of the Chief Justice in 1995. They are essentially parallel courts outside the central legal system, a tradition which began with the creation of emergency courts during the time of Nimeri..... these parallel courts have been courts of summary jurisdiction with greatly restricted procedural safeguards'. The report further states 'the trial process is intended to be swift (a hearing may not take more than few minutes and the arrest, detention, imposition of penalty generally occur within 24 hours); there is no requirement to permit the accused to prepare a defence; the right to legal assistance, let alone legal aid.... Once a person has been found guilty of an offence the punishment is immediately imposed'.

¹² See A. Abdel Halim, 'Gendered Justice: Women and the Application of Penal Laws in Sudan', in Oette, above note 1, 227-241.

The prohibition of arbitrary arrest and detention is affirmed in article 29 of the Bill of Rights, which stipulates that '[e]very person has the right to liberty and security of the person; no person shall be subjected to arrest, detention, deprivation or restriction of his/her liberty except for reasons and in accordance with the procedures prescribed by law'. This article is one of the most important provisions of the Bill of Rights as it deals with the rights of accused persons that are constantly violated in the Sudanese context. However, a closer analysis of this article shows that it suffers from substantive and procedural gaps.

Article 29 does not include the word '*arbitrary*' when referring to arrest, detention and deprivation of liberty. The lack of arbitrariness is central to the prohibition under international law, and includes both lawfulness and the modalities of enforcement of the law.¹³ Another serious gap is the lack of *procedural guarantees* that help ensure enjoyment of its substantive guarantees. A comparison between article 29 and the procedural standards included in article 9 (2) to (5) of the ICCPR shows that the former is limited in terms of its 'procedural scope'. Requirements such as the right to be informed of a criminal charge; prompt presentation before a judicial officer or other person authorised by law; length of pre-trial detention; right to release pending investigation; right of habeas corpus; and the right to compensation are not included in article 29. These procedural guarantees are of utmost importance for defendants at the pre-trial stage. This applies in particular to judicial safeguards. Notably, article 29 (unlike Article 9 (3) of the ICCPR) does not require that any person arrested or detained on suspicion of having committed a criminal offence be brought promptly (i.e. within a few days) before a judge or other judicial officer authorised by law to exercise judicial power.¹⁴

The protection against arbitrary deprivation of liberty is in practice further limited by Sudanese criminal laws, security laws and terrorism legislation. Article 29 provides that persons can be deprived of their liberty 'for reasons and in accordance with the procedures prescribed by law'. However, the laws in question are not sufficiently specific to allow individuals to foresee the consequences of their action. They provide for wide grounds of arrest and detention and there are persistent concerns about violations of the right of suspects in criminal cases. The NISS Act 2010, in particular, allows security officers, who are evidently not judicial officers authorised by law, to arrest and detain individuals for a maximum period of four and a half months before a detained person must be brought before a judge.¹⁵ The Criminal Procedures Act 1991 specifies a period of three days within which a person needs to be brought

¹³ Joseph, et al., above note 3, 308-9. See also *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

¹⁴ See on the notion of promptness, Human Rights Committee, General Comment 8, Article 9 (1982), para. 2, and Joseph et al., above note 3, 324-5.

¹⁵ Article 50 (1) (f), (c) (g), (h,) on powers of arrest and detention given to NISS members and Director under the Act.

before a judge and provides for a number of safeguards.¹⁶ However, pre-trial detention can be extended for a period of six months, after which any further extensions need to be approved by the Chief Justice.¹⁷ The problem is that the Act does neither stipulate a time limit for pre-trial detention nor a timeframe for trials.¹⁸ In practice, it is for the Chief Justice to decide on the time limit in any given case, which carries the risk of arbitrary decision-making without the possibility of judicial review.¹⁹ This lacunae in Sudanese criminal laws needs to be addressed in any constitutional review process as pre-trial detention should be an exception and as short as possible as recognised in article 9(3) of the ICCPR.²⁰

Article 29 does not include one of the most important guarantees, namely the right of *habeas corpus* which is enshrined in article 9 (4) of the ICCPR. The right to *habeas corpus* entitles any person who has been deprived of his or her liberty, for whatever reason, to challenge the lawfulness of his/her detention in a court without delay. Sudanese laws do not provide detainees with an effective remedy against arbitrary detention.²¹ It is essential that this right be included as part of the Bill of Rights of the forthcoming constitution, together with the right to access to a lawyer of one's choice. These rights, which constitute critical safeguards against both arbitrary detention and torture, are presently not provided for in the NISS Act 2010.²² Access to lawyers is critical to *habeas corpus* and the Human Rights Committee has clearly linked access to legal representation with enjoyment of the right in Article 9(4) of the ICCPR, particularly in instances of incommunicado detention.²³

Sudanese criminal laws also do not explicitly state that lawyers have the right to be present during the investigation stage or be able to review the legality of detention during the pre-trial stage. Even where detention is lawful in municipal law (as in the Sudan case), lawfulness in article 9 (4) means 'lawfulness' under the Covenant, rather than 'lawfulness' in municipal law. In this sense, 'lawful' in Article 9 (4) equates with 'non arbitrariness'²⁴ and must include the right and opportunity to effectively challenge the legality of detention.

¹⁶ The General Principles stipulated in article 4 of the Criminal Procedure Act 1991 provide some safeguards including the rights to be informed of the reason of arrest, to prompt access to a lawyer of one's choice, to access to a doctor and to communicate with a family member.

¹⁷ Under Article 79 of the Criminal Procedures Act 1991 the police may detain individuals for up to six months. The Prosecution Attorney may renew detention in Police custody for a period not exceeding three days, after which the judge may order detention for a period for one week, which can be extended once. If the detained person has been charged, the judge may order to extend detention every two weeks for a total of six months.

¹⁸ See N. Adib, 'At the State Mercy: Arrest, Detention and Trials under Sudanese Law', in Oette, above note 1, 121-138, at 128-9.

¹⁹ Ibid.

²⁰ See General Comment 28, above note 6, para. 3.

²¹ REDRESS and KCHRED, *Criminal law and human rights in Sudan*, A Baseline Study, 2008, 13.

²² See articles 50 and 51 NISS Act 2010.

²³ In *Hammel v Madagascar* (155/1983), 3 April 1987, incommunicado detention rendered habeas corpus action impossible.

²⁴ See *A v Australia* (560/93), UN Doc. CCPR/C/59/D/560/1993 (30 April 1997) para. 9.5.

Finally, article 29 does not provide for the right of compensation to persons who have been unlawfully deprived of their liberty. Article 9 (5) of the ICCPR prescribes payment of compensation for unlawful detention. According to the Human Rights Committee, this includes cases where detention is 'lawful' under domestic law but contrary to the Covenant.²⁵ The forthcoming constitution should explicitly provide for the right of enforceable compensation in the event of unlawful deprivation of liberty as provided for in article 9 (5) of the ICCPR and other international human rights instruments.²⁶

2.1.3. Fair Trial Guarantees

Sudan's Bill of Rights guarantees the right to a fair trial under article 34 of the INC which states that 'in all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by an ordinary competent court of law in accordance with procedures prescribed by law'. Article 34 also guarantees detainees' right to be immediately informed of the reasons of their arrest and of having charges promptly brought against them; the right of accused persons to be tried in their presence on any criminal charges without delay, as well as their right to defend themselves through a lawyer of their choice. Fair trial guarantees are all enshrined in international human rights norms and instruments to which Sudan is a party such as the ICCPR and the African Charter on Human and Peoples' Rights.²⁷

However, one of the structural limitations of the Bill of Rights is that articles 29 (personal liberty and security of person) and 34 (fair trial) were confused in terms of their logical relationship or sequence. The rights of the accused persons in both articles were not carefully drafted and do not take into consideration that criminal proceedings pass through various stages from arrest to post trial.

²⁵ Ibid., para. 11.

²⁶ Article 5 (5) of the European Convention on Human Rights provides that '[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.' See also *B. Whyte v. Jamaica*, Communication No. 732/1997, (Views adopted on 27th July 1998), in UN Doc. GAOR, A/53/40 (vol. II), 200, para. 7.4. See also European Court of Human Rights, *Case of Brogan and Others v. the United Kingdom*, Judgment of 29 November 1988, Series A, No. 145-B, 35, paras. 66-7.

²⁷ Sudan's international obligation to provide any accused with a fair trial before Sudanese courts derives from article 14 of the ICCPR and from article 7 of the African Charter on Human and Peoples' Rights. Article 14 stipulates that "everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". International standards require states to respect a number of guarantees in any criminal trial, including the right to be presumed innocent, the right to be informed promptly of the charges, the right to be represented and to communicate in confidence with legal counsel of their choice. Furthermore, defendants have the right not to be compelled to confess guilty and any evidence elicited as a result of torture or other ill-treatment must be excluded. The African Commission's Principles and Guidelines on the Rights to Fair Trial and Legal Assistance in Africa provides more instructions regarding the access to legal aid, the conditions of detention and other elements such as judicial proceedings that contribute to guaranteeing the right to a fair trial.

For example, article 34 (2) (which focuses on fair trial) provides that 'every person who is *arrested* shall be informed, *at the time of arrest*, of the reasons for his/her arrest and shall be promptly informed of any charges against him/her'. The requirement of prompt information, however, only applies once the individual has been formally charged with a criminal offence (article 14 (3)(a) of the ICCPR). It does not apply to those remanded in custody pending the result of police investigations, which is covered by article 9 (2) of the ICCPR.²⁸ The language of article 34 therefore systematically belongs to article 29 (right to liberty and security). The use of the words 'arrest', 'the time of arrest' indicates clearly the degree of confusion between articles 29 and 34 of the Bill of Rights; both articles guarantee human rights of the accused but these guarantees operate at different stages of criminal proceedings.

Fair trial guarantees are extremely important in the Sudanese context as they are linked to the preservation of other rights including the right to life and the prohibition of torture. Practice indicates that many accused persons in Sudan have been compelled to confess guilt while in custody or detention.²⁹ National laws are not in harmony with international human rights treaties³⁰ and contradict the fair trial guarantees enshrined in article 34. For example, the Evidence Act 1993 does not outlaw evidence obtained through illegal means if such evidence is corroborated by other evidence.³¹ In terms of judicial practice, verdicts have in some instances been based on confessions even though the defendants alleged that they had been obtained under torture.³² Allegations raised by accused

²⁸ It states 'anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'.

²⁹ The Working Group on Arbitrary Detention issued a legal opinion in November 2008 in which it raised serious questions about the fairness of the trial of individuals accused of having committed the murder of newspaper editor Mohamed Taha Mohamed Ahmed. The opinion states: 'No judicial system, and in particular, the judicial system of a country that ratified [the ICCPR...] can consider as valid a confession obtained under torture and revoked before a court, and a sentence based on such confession'. Opinions adopted by the Working Group on Arbitrary Detentions, Opinion 38/2008 (Sudan), UN Doc.A/HRC/13/30/Add.1, 2 March 2010, 166-181, at para.48. See also statement dated 19 April 2009 of five UN human rights experts (special procedures mandate holders) strongly condemning the execution of nine of the same defendants, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9245&LangID=E>.

³⁰ For example, Article 14(3)(g) of the ICCPR provides that 'in the determination of any criminal charge against him', every person has the right 'not to be compelled to testify against himself or to confess guilt'; Article 15 of the Convention against Torture stipulates that 'each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'; Article 8(2)(g) of the American Convention on Human Rights provides that everyone has 'the right not to be compelled to be a witness against himself or to plead guilty', article 8(3) of the same convention further specifies that 'a confession of guilt by the accused shall be valid only if it is made without coercion of any kind'. Article 55(1)(a) of the Statute of the International Criminal Court and articles 20(4)(g) and 21(4)(g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia also contain protection against self-incrimination.

³¹ Article 20 of the Evidence Act of 1993 appears to rule out the use of evidence extracted under torture. However, article 10 of the Act gives judges discretion to admit any evidence if they determine it to be acceptable, in particular where corroborated by other evidence.

³² See the submission of case of *Mayor Hussein Ishaq Sayo and others v. Director of North Darfur State Police and Others* lodged before the Sudanese Constitutional Court in 2007 (on file with REDRESS).

persons that they were forced to confess guilt have been routinely ignored.³³ Judges should have the authority to consider at any stage of the case allegations made that the rights of the accused have been violated. Guideline 16 of the Guidelines on the Role of Prosecutors provides that prosecutors shall refuse evidence that has been obtained by recourse to unlawful methods.³⁴ It is therefore imperative that the forthcoming constitution unequivocally prohibits the use of confessions obtained by means of torture and enshrines the prohibition of self-incrimination.

The constitution should also address repressive laws affecting fair trial guarantees such as the NISS Act 2010, Criminal Act 1991 (i.e. crimes against the state) and emergency and terrorism legislations which provide the authorities with broad powers that undermine the right to fair trial, including the setting up of special courts.³⁵ Sudan's practice illustrates that the systematic use of these laws has undermined the rights of the accused persons to have fair trials guarantees and widened the scope of prosecutions.³⁶ These laws are overly broad and vague, provide grounds for arbitrary arrests and prolonged detention and violate the right to fair trial. The forthcoming constitution should provide comprehensive safeguards and fair trial guarantees, and ensure that rights such as *habeas corpus* cannot be derogated from in times of emergencies.³⁷

The right to a fair trial also includes the right of access to justice, and is closely related to the right to an effective remedy, which is reflected in article 35 of the Bill of Rights. This right requires states to remove barriers to access to justice, including amnesty and immunity laws that may frustrate the right to reparation and accountability for human rights violations.³⁸

2.1.4. The Death Penalty

Article 36 of the Bill of Rights prohibits the imposition of the death penalty on a person under the age of eighteen or a person who has attained the age of seventy and delays its imposition on pregnant or lactating women 'after two years of lactation'. However, the Bill does not ban the death penalty, which can be

³³ See in particular the case concerning the killing of the journalist Mohamed Taha Mohamed Ahmed, *Ishaq al-Sanousi and others v successors of deceased Mohamed Taha Mohamed Ahmed*, Case No. MD/QD/121/2008, Constitutional Court Order of 23 March 2009.

³⁴ See *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 283, Chapter 7 - *The Right to a Fair Trial: Part II – From Trial to Final Judgement*, Publications of the Office of the High Commissioner for Human Rights, UN, New York and Geneva, 2003.

³⁵ The Emergency and Protection of Public Safety Act of 1997 (Act Number (1) 1998) also provides for the establishment of Special Courts without providing adequate fair trial.

³⁶ Similar practices have taken place in some Latin American countries and Sri Lanka. On these practices, see *Repressive Criminal Legislations*, in Oette, above note 1, 59-65.

³⁷ For such guarantees see *Aksoy v Turkey*, 23 EHRR 533 (1996), paras. 67-87.

³⁸ See M. A. Babiker, 'The Prosecution of International Crimes under Sudan's Criminal and Military Laws: Developments, Gaps and Limitations', in Oette, above note 1, 161-181.

imposed in cases of retribution, *hudud*³⁹ or punishment for extremely serious offences. The mandatory imposition of the death penalty is contrary to the right to life under international law.⁴⁰ In addition, the retention of the death penalty runs counter to a growing trend towards its abolition worldwide.⁴¹

2.1.5. The Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 33 of the Bill of Rights (prohibition of torture) fails to prohibit cruel, inhuman or degrading punishment, such as corporal punishments, an omission that is incompatible with international standards binding on Sudan and forming part of the Bill itself by virtue of article 27(3).⁴² In addition, in line with recent constitutional practice in countries such as in Morocco and Nepal,⁴³ the article pertaining to the right to be free from torture should stipulate a duty to criminalise torture and recognise a specific right to reparation for torture, both of which are absent in Sudan's law.⁴⁴

3. The constitutional framework for the effective implementation and protection of rights: Mechanisms and Processes

3.1. Statutory Criminal Law Reform & Constitutional Guarantees: A Dichotomy

The current Bill of Rights provides human rights from a criminal justice perspective which the State shall respect, protect, promote, and guarantee its implementation. While the current constitutional framework provides some guarantees from a criminal justice perspective, experience to date demonstrates that the constitution has failed to be 'translated' into practice, particularly where the requisite legislative (statutory law) and institutional reforms and adequate judicial protection have been absent. As the substantive shortcomings in Sudan's

³⁹ According to article 3 of Sudan's Criminal Act of 1991, "hudud offence" 'means the offences of drinking alcohol, apostasy (ridda), adultery (zina), defamation of unchastity (quazf) armed robbery (hiraba) and capital theft'.

⁴⁰ *Weerawansa v Sri Lanka*, UN Doc.CCPR/C/95/D/1406/2005, 14 May 2009, para.7.2.

⁴¹ See <http://www.amnesty.org/en/death-penalty>.

⁴² See REDRESS and SHRM, *No more cracking of the whip: Time to end corporal punishment in Sudan*, February 2012.

⁴³ See article 22 of the Constitution of Morocco, 2011, and article 26 of the Interim Constitution of Nepal, 2007.

⁴⁴ See REDRESS and SOAT, *National and International Remedies for Torture: A Handbook for Sudanese Lawyers*, 2005, 32-37.

criminal laws have been identified and analysed in detail elsewhere,⁴⁵ the following sections will focus on the institutional reforms needed to enhance protection.

3.2. Institutional Security Sector Reform

After the signing of the CPA, the interim constitution envisaged that laws governing institutions such as the national security and intelligence agencies (National Security Forces Act of 1999) should be reformed.⁴⁶ The goal was to bring the law in line with the CPA's vision of the National Security Force as an agency with a mandate to gather information and provide analysis and advice to appropriate authorities.⁴⁷ The 2010 National Security Act was passed by the National Assembly in December 2009 and came into force in February 2010. However, the new Act is not in line with the Interim Constitution that envisaged the NISS to become an intelligence service without any powers of arrest and detention. Instead, the Act maintains the extensive powers of arrest and detention that were given to the NISS under the 1999 National Security Forces Act. It also maintains the immunity from prosecution that was granted to NISS members under the earlier law. The 2010 National Security Act fails to introduce the necessary guarantees to prevent arbitrary detentions, torture and other ill-treatment.⁴⁸

Against this background, any effective constitutional review process focusing on criminal law reform and protection of human rights in Sudan should include (as a priority) what is commonly referred to as security sector reform (SSR) (i.e. police, security services, the military). The constitution should address existing powers of arrest and detention, immunities of such forces and make them accountable, particularly by means of parliamentary oversight and judicial oversight. Given the failure of past constitutions effectively to guarantee human rights, SSR is at the heart of constitutional reforms and needs to be addressed to ensure that law enforcement agencies respect the rule of law and individual rights in the course of the exercise of their powers.

3.3. Commissions and Oversight Bodies

The CPA established several commissions to function as oversight bodies mandated with the protection of human rights. Part Eight of the Constitution (Independent Institutions and Commissions) envisages that such bodies play an

⁴⁵ See publications available on the website of the Project on Criminal Law Reform in Sudan, www.pclrs.org.

⁴⁶ Article 151 INC.

⁴⁷ See for a thorough analysis, REDRESS and SORD, *Security for All-Reforming Sudan's National Security Service*, 2009.

⁴⁸ Amnesty International, *Agents of Fear: National Security Service in Sudan*, Index: AFR 54/010/2010.

effective supervisory role, in particular the National Constitution Review Commission (NCRC),⁴⁹ the Human Rights Commission⁵⁰ and the National Judicial Service Commission. The NCRC could have been an important actor with regard to law reform and harmonization of national laws with the constitution. In practice, it has largely failed to address the apparent dichotomy between constitutional human rights norms and existing legislation. During the CPA implementation, the lack of a transparent process of law reform was evident and designated bodies such as the NCRC had limited capacity, powers and operational independence. Although the CPA identified specific laws that need to be reformed, provided for the establishment of the NCRC and a Law Reform Committee (LRC) at the Ministry of Justice to ensure compatibility with the CPA and the Interim National Constitution, there has been limited progress, particularly regarding the harmonisation of existing laws with the Bill of Rights.⁵¹ In the post CPA era, the new constitution should therefore establish a Law Reform Commission, as in other jurisdictions such as Uganda and South Africa which often have important roles in initiating or framing processes of law reform that is transparent and inclusive.⁵²

Other Commissions such as the National Human Rights Commission and the National Judicial Service Commission could also play an effective role in the protection and promotion of human rights from a criminal justice perspective. The National Human Rights Commission was created by an Act of parliament in 2009. Its members were appointed in January 2012 almost three years later. The establishment of the Commission has the potential to strengthen the system of national human rights protection if properly constituted and resourced. The Act vests the Commission with a mandate to monitor the application of the rights and freedoms provided for in the Bill of Rights, as well as the powers to receive complaints of violations⁵³ and to ensure harmonisation of laws with the Bill of Rights.⁵⁴ However, there are a number of gaps in the Act that may hinder the ability of the Commission to carry out its mandate effectively and independently. In particular, the law could be further elaborated in relation to the Commission's quasi-judicial competence to deal with complaints and investigate human rights violations *proprio motu*; and issues relating to its accessibility. Another area of

⁴⁹ Article 140 (1) INC.

⁵⁰ Article 142 INC.

⁵¹ See REDRESS, *Promoting law reform in Sudan to enhance human rights protection, strengthen the rule of law and foster democratic processes*. Written Evidence submitted by the Redress Trust to the UK Associate Parliamentary Group on Sudan: Parliamentary Hearings, Sudan's Comprehensive Peace Agreement, 15 October 2009, available at www.pclrs.org and http://www.redress.org/country_sudan.html

⁵² See L. Oette, 'Future Perspectives: Debating Criminal Law Reform and Human Rights in Sudan', in Oette, above note 1, 297-301.

⁵³ Article 9 (2) (h) provides that the Commission is tasked to 'receive complaints from individuals and other bodies and to conduct investigations thereon and to take the necessary measures in accordance with the provisions of this Act or any other law and to recommend appropriate remedies to the relevant body'.

⁵⁴ Article 9 (2) (k) provides that the Commission shall 'endeavour to harmonize national legislations and practices with human rights standards'.

concern is the selection and appointment process for Commission members that is largely controlled by the executive.⁵⁵

The main purpose of the National Judicial Service Commission is to commence the process of institutional reform of the judiciary so that it will be able to develop new roles and to accommodate the new constitutional provisions to reform the judiciary.⁵⁶ The philosophy behind the introduction of the Judicial Service Commission was to act as a supervisory body over the work of the judiciary. However, there are concerns that the body has not been able to perform its envisaged role and progressively achieve judicial reform and independence. First, the Commission was expected to focus on substantive issues including the promotion of the rule of law and judicial independence. Instead, the Commission has concentrated on procedural issues (i.e. removal and disciplinary of judges, conditions of service). As a result, the Commission's work did not result in genuine and tangible changes in the performance of the judiciary in terms of public confidence and accessibility. Secondly, the Commission has not acted as a real supervisory body over the judiciary because the Chief Justice is the Head of the Commission and he is in a position to set the agenda of the Commission and its actual role. Thirdly, the Commission has not addressed critical issues and adopted policies with regard to issues frequently raised about the judicial authority and independence. This includes in particular judicial competence over the judicial work and the interference of the Ministry of Justice with the work of the judiciary by staying or dismissing proceedings. Other issues include the role of the judiciary with regard to special courts and immunities granted to law enforcement officials.

3.4. Judicial Independence

Sudan's constitutional court has not effectively exercised its function of protecting constitutional rights. Other courts have also been reluctant to challenge the executive branches of government and adopt purposive interpretations to give effect to constitutional rights. Judicial decisions rarely consider the application of international human rights law despite the fact that courts have an obligation under article 27 (3) of the INC to apply international human rights law. This judicial practice is not confined to the CPA era. Historically, courts only rarely issued decisions when interpreting the law to ensure that the human rights of the accused are respected in the criminal justice domain.⁵⁷ The current practice

⁵⁵ Article 6 provides that ' the Commission shall be composed of fifteen members appointed by the President of the Republic after consultations at the Presidency and obtainment of the approval of the First Vice President'.

⁵⁶ Article 129 of the INC 2005 provides that the President of the Republic, after consultation within the Presidency, shall establish the National Judicial Service Commission to undertake the overall management of the National Judiciary.

⁵⁷ See A. Suliman, *Human Rights in the Forthcoming Constitution*, Herouf Journal, Khartoum University Press, 1989 (Arabic).

since the signing of the CPA and the adoption of the Bill of Rights shows that courts, in particular the Constitutional Court, have failed to protect the constitutional rights of accused persons. Examples abound.⁵⁸ Courts not only failed to address core human rights related to the administration of justice and freedom of expression but judges apparently lack the expertise, training and essential knowledge when handling sensitive human rights cases. When addressing the right to a fair trial, the right not to be subjected to torture/ill-treatment, and prolonged detention without judicial oversight, Sudanese judges routinely do not order investigations into allegations of violations of due process rights or torture. In addition, evidence obtained through torture can be accepted by Sudan's courts and contribute to proof of a defendant's guilt.⁵⁹

The question remains: what role can judges or the judiciary play in order to ensure that the Bill of Rights of the Constitution is effectively applied? The text of the INC provides the Constitutional Court with a clear mandate under articles 119-122 to protect human rights and fundamental freedoms⁶⁰ and the jurisdiction to 'adjudicate on the constitutionality of laws'.⁶¹ In addition, the forthcoming constitution should clearly set out obligations of courts when interpreting the Bill of Rights. This includes consideration of international human rights law and its developed jurisprudence. Furthermore, when interpreting any legislation courts must promote the spirit, purpose, and objects of the Bill of Rights; courts should consider international law and may also consider best practices adopted in other countries.⁶² The judiciary, as an institution, must guide judges to adopt purposive or golden interpretations (as in the common law system) in order to give effect to the words and spirit of the Bill of Rights. Courts shall be instructed, when interpreting the Bill of Rights or directive principles of the constitution to give effect to the actual purpose or intent of the legislature. The constitutional text itself should also dictate that judges should apply the spirit of the Bill of Rights.

In addition, phrases in Bill of Rights such as 'provided by law' or 'established by law' or 'in accordance with the law' shall be interpreted to further the purpose of human rights protection. 'Limitation clauses' shall also be interpreted reasonably in order to give effect to the application of the spirit and wording of the Bill of Rights. The forthcoming constitution should therefore put in place arrangements to ensure that the Bill of Rights shall be respected and not to be subjected to unreasonable restrictions, particularly by means of applicable statutory laws. To

⁵⁸ I.e. *Kamal Mohammed Saboon v Government of Sudan*, Constitutional Court, 2009; *Faroug Mohamed Ibrahim Alnour v (1) Government of the Sudan; Legislative Body*, Final order by Justice Abdalla Aalamin Albashir President of the Constitutional Court, 6 November 2008.

⁵⁹ Article 10 of the Evidence Act 1993 permits evidence obtained through illegal means if corroborated by other evidence.

⁶⁰ Article 122 (1) (d) INC.

⁶¹ Article 122n (1) (e) INC.

⁶² See for example Article 39 (1) of the South African Constitution: 'When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.'

this end, any contradiction between the Bill of Rights and national laws shall be regarded as null and void.

The issue of constitutional interpretation leads to another related point, namely the need for judicial activism or judicial 'vitalization' in order to make the constitution a living document. This requires proactive, skilled and trained judges as well as truly independent judiciary to assume its role. Constitutional developments in other jurisdictions testify to this reality. For example, Indian apex courts have redefined the relationship between fundamental rights and directive principles (which are not justiciable under the constitution). The courts have approached the two categories in an integral manner, one result of which is to give some directive principles the status of fundamental rights.⁶³

⁶³ See *Olga Tellis v Bombay Municipal Corporation*, Supreme Court of India, 1985, AIR, 1986 Supreme Court 18, according to which the right to life under 21 of the Indian Constitution includes the right to livelihood (article 37 (a) of the Indian Constitution).

Recommendations

REDRESS and the Sudan Human Rights Monitor emphasise the need for a thorough review of the set of fundamental rights pertaining to the criminal justice process and recommend including the following changes:

1. Substantive Changes

Right of non-Discrimination and Equality before the law

- Include reference to the grounds of non-discrimination of '*national or social origin, property, birth, or other status*' as stipulated in articles 2 (1) and 26 of the ICCPR. Other grounds of discrimination, such as age or disability, should be added, taking into consideration Sudan's obligations under international law and the need to combat specific forms of discrimination.
- Stipulate the need for the state to take proactive legislative measures to prohibit discrimination by providing that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground'.
- Prohibit advocacy for various forms of national, racial or religious hatred which may amount to incitement to discrimination, hostility or violence as in the case of article 20 of the ICCPR; prohibit racial discrimination and the dissemination of ideas or theories of superiority of one race or groups of persons as set out in article 4 ICERD.

Equality of men and women

- Impose direct obligations on the state to take all necessary steps to enable every person to enjoy equality rights.
- Include equality in respect of the administration of criminal justice, in particular removing laws that prevent women from direct and autonomous access to the courts; guaranteeing women's rights to give evidence as witnesses on the same terms as men; and providing women with the right to equal access to legal aid, in particular in family matters.
- Provide that penalties for the same crime are identical and not differentiated according to gender.

- Stipulate a duty on the state to protect women against all forms of violence through legislative and other measures.

Freedom from arbitrary arrest and detention

- Specify that arrest and detention must not be '*arbitrary*' to bring the constitutional protection in line with international human rights standards binding on Sudan.
- Expressly include procedural guarantees found in article 9 (2) to (5) of the ICCPR that help to ensure enjoyment of the substantive guarantees. This includes the right to be informed of the reasons for arrest or detention; prompt presentation before a judicial Officer or other person authorised by law; length of pre-trial detention; right to release pending investigation; right to be brought promptly (within 48 hours) before a judge in criminal cases, the right of habeas corpus and the right to compensation for arrest or detention in violation of fundamental rights. The right of habeas corpus should be made non-derogable.

Administration of justice and the right to a fair trial

- Set out the components of the right to a fair trial with reference to article 14 ICCPR and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. This should include in particular the following rights and principles, which also act as safeguards against torture:
- Right of access to a lawyer of one's choice at all stages of proceedings; right not to incriminate one self; and exclusion of evidence obtained under torture or other ill-treatment.
- Provide that civilians should not under any circumstances be tried before military or special courts or summary courts; conversely, stipulate that officials accused of having committed human rights violations should be tried before civilian courts.
- Provide for the right of access to justice, stipulating that the state should take legislative and other measures to ensure the effective exercise of this right on a non-discriminatory basis.

Death Penalty

- Consider abolishing the death penalty. Short of such abolition, ensure that the death penalty may only be imposed in accordance with international standards (following a fair trial for the most serious crimes on a non-mandatory basis and allowing for the right to appeal; not against certain categories of persons, particularly minors).

Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

- Include the prohibition of cruel, inhuman or degrading treatment or punishment.
- Adding that torture should be made punishable as a criminal offence and that victims of torture be provided with an express right to reparation.

2. Statutory Criminal Law Reform

- Providing that the state should take legislative measures to bring all laws in conformity with the Bill of Rights and binding international human rights standards;
- Providing that legislation shall be interpreted so as to be in conformity with the Bill of Rights and applicable international human rights standards;
- Stipulating that laws contravening the Bill of Rights are deemed null and void.
- Establish a Law Reform Commission mandated to review conformity of existing laws and new laws with the Bill of Rights, in particular criminal laws.

3. Institutional Reforms

Security Sector Reform

- Security sector reform (SSR) should be an integral process of effective constitutional review, including, in particular, existing powers of arrest and detention, confiscation of assets or properties and immunities of relevant agencies as well as effective parliamentary and judicial oversight.

4. Judiciary and Protection of Human Rights

- Vest the National Judicial Service Commission which replaced the High Judicial Council with a new mandate and functions effectively to commence the process of institutional reform of the judiciary. The Commission as a supervisory body should be tasked with focusing on substantive issues including the promotion of the rule of law and endeavouring to promote judicial independence. It should also be mandated to promote public confidence in the administration of justice and enhance accessibility of the criminal justice system.
- Emphasise the role and duty of the Constitutional Court to act as guardian of the Constitution and fundamental rights
- Impose an express obligation on courts when interpreting the Bill of Rights to consider international human rights law and its developed jurisprudence. When interpreting any legislation, courts must promote the spirit, purpose, and objects of the Bill of Rights; and may also consider best practices adopted in other countries.